IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

JOHN S. GUIDO.

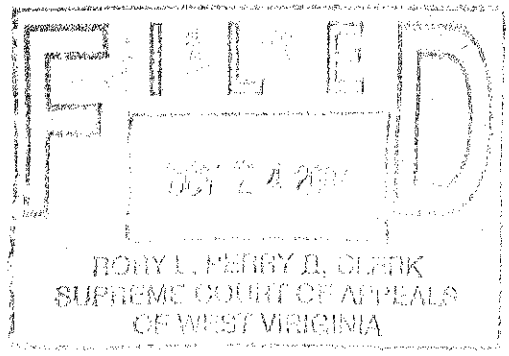
Appellant,

Supreme Court of Appeals No: 33599
Marion County L.T. CASE NO: 94-D-404

v.

KENDRA M. GUIDO (NOW GRAY).

Appellee.



APPELLATE BRIEF OF JOHN S. GUIDO
FROM THE CIRCUIT OF MARION COUNTY
THE HONORABLE DAVID R. JANES

Dated: October 23, 2007

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I. THE KIND OF PROCEEDING AND NATURE OF THE RULING OF THE LOWER TRIBUNAL

This appeal arises from an order that was issued by the Honorable David R. Janes, Circuit Judge, Marion County, on April 11, 2007 wherein Judge Janes denied, without hearing, Appellant's Motion for Reinstatement of Appeal and, in the Alternative, Motion for Reconsideration. In his motion, Appellant requested Judge Janes to reinstate his appeal of a final order issued by the Honorable David P. Born, Family Court Judge, on December 20, 2006. Appellant now appeals Judge Janes' order and requests this honorable court to reinstate his appeal of Judge Born's Final Order.

II. STATEMENT OF THE FACTS OF THE CASE

On November 30, 2006, the Honorable David P. Born, Family Court Judge, conducted a hearing on a motion by the West Virginia Bureau of Child Support Enforcement for a Decretal Order against Appellant for arrearages in the Appellant's obligation to pay child support to Appellee, his former wife, KENDRA M. GRAY (formerly Kendra M. Guido).

On December 20, 2006, Judge Born issued a Decretal Judgment Order wherein, by implication, he rejected Appellant's statue of limitations defense and awarded a judgment against Appellant in the amount of Eleven Thousand, Three Hundred Six Dollars and Seventy Five Cents ($11,306.75) in principle and Eleven Thousand Four Hundred Sixty Dollars and Forty Two Cents ($11,460.42) in interest for a total judgment in the amount of Twenty Two Thousand Seven Hundred Sixty Seven Dollars and Seventeen Cents ($22, 767.17).

In his Decretal Judgment Order, Judge Born further advised that his order would become a final order upon his signing of same and that any party desiring to appeal his final order could appeal either to the Circuit Court of Marion County, West Virginia or the West Virginia Supreme Court of Appeals. Judge Born's Decretal Order also advised the parties that an appeal to the circuit court must be filed within thirty (30) days and, in order to appeal directly to the Supreme Court of Appeals, both parties must, within fourteen (14) days, file a Joint Notice of Intent to Appeal and a Waiver of the Right to Appeal to the Circuit Court.

On January 2, 2007, Appellant timely filed his "Petition for Appeal from Family Court Final Order." Because both parties did not file a Notice of Intent to Appeal and the Waiver of the Right to Appeal to the Circuit Court, Appellant's appeal was referred to the Circuit Court of Marion County, West Virginia, Division II.

On January 22, 2007, the Honorable David R. Janes, Circuit Judge, entered an order denying the Appellant's Petition for Appeal from Family Court Final Order. In his order, Judge Janes cited as grounds for his denial of Appellant's appeal the fact that the certificate of service attached to Appellant's Petition for Appeal had not been completed and there was no other indication that Appellant had either served Appellee or Joseph M. Sellaro, Esquire, of the Bureau of Child Support Enforcement with a copy of his Petition for Appeal from Family Court Final Order as required by West Virginia Code § 51-2A-11(b).

On February 5, 2007, Appellant filed in the Marion County Circuit Court "Defendant's Motion for Reinstatement of Appeal and in the Alternative, Motion for Reconsideration." In his motion, Appellant moved the circuit court to reinstate his

appeal of Family Court Judge David P. Born's Decretal Judgment Order dated December 20, 2006. In support of this motion, Appellant and his mother, Josephine Guido, who had assisted him with the preparation and filing his Petition for Appeal, submitted affidavits wherein they set forth the facts concerning the circumstances that had resulted in the noncompletion of the certificate of service on Appellant's standard form, Petition for Appeal, from Family Court Final Order.

A hearing on the Appellant's Motion for Reinstatement of his Appeal was scheduled to be heard by Circuit Judge, David R. Janes, on April 23, 2007. On April 11, 2007, however, without a hearing, Judge Janes entered an order wherein he denied the Appellant's Motion for Reinstatement for Appeal and, in the Alternative, Motion for Reconsideration. It was this order that is the subject matter of the instant appeal.

On May 17, 2007, Appellant filed his Petition for Appeal with respect to Judge Janes' Order. On September 20, 2007, Appellant's Petition for Appeal was granted by the Supreme Court of Appeals.

III. ASSIGNMENTS OF ERROR RELIED ON APPEAL AND THE MANNER IN WHICH THEY WERE DECIDED IN THE LOWER COURT.

The lower tribunal erred in dismissing Appellant's Petition for Appeal of Family Court's Final Decretal Judgment Order. In moving the lower court to reinstate his appeal, Appellant argued that his Petition for Appeal of Family court's Final Decretal Judgment Order should be reinstated because his failure to complete the certificate of service attached to his Petition for Appeal was the product of an honest mistake and did not result in any actual prejudice to any of the parties.

IV. POINTS AND AUTHORITIES RELIED UPON, A DISCUSSION OF THE LAW, AND THE RELIEF PRAYED FOR

THE LOWER TRIBUNAL ERRED IN DISMISSING APPELLANT'S PETITION FOR APPEAL OF FAMILY COURT JUDGE BORN'S FINAL DECRETAL JUDGMENT ORDER BECAUSE THE APPELLANT'S FAILURE TO COMPLETE THE CERTIFICATE OF SERVICE ATTACHED TO HIS PETITION FOR APPEAL WAS THE PRODUCT OF AN HONEST MISTAKE AND HIS DID NOT RESULT IN PREJUDICE TO ANY OF THE OTHER PARTIES TO THE APPEAL.

Because this appeal only involves legal questions, it is subject to *de novo* review for which no party bears the burden of proof. *See, Mildred L. M. v. John O. F.,* 192 W. Va. 345, 452 S.E.2d. 436 (W. Va. 1994). Although the circuit court's order dismissing Appellant's Petition for Appeal from Family Court Final Order does not expressly state so, it appears to imply that the failure by Appellant to complete the certificate of service on his Petition for Appeal from Family Court Final Order as required by West Virginia Code § 51-2A-11(b), deprived the circuit court of jurisdiction to entertain the appeal of Family Court Judge Born's order. West Virginia Code § 51-2A-11(b) states:

> A petition for appeal of a final order of the family court shall be filed in the office of the clerk of the circuit court. At the time of filing the petition, a copy of the petition for appeal must be served on all parties proceeding in the same manner as pleadings subsequent to an original complaint are served under Rule 5 of the Rules of Civil Procedure.

W. Va. R.C. P., Rule 5(a), in turn, states as follows:

> Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar papers shall be served upon each of the parties. For purposes of this rule, guardians ad litem are considered parties. No service need be made on parties in default for failure to appear except the pleadings asserting new or additional claims for relief against them shall be served upon them in a manner provided for service of summons in Rule 4.

In essence, what the Appellant did with respect to filing his Petition for Appeal was fail to comply with the requirements of Rule 5(a) with regard to the provision that he serve copies of the Petition for Appeal on his former spouse, and the Bureau of Child Support Enforcement. A party's noncompliance with a rule of civil procedure, however, cannot, in by itself, act to deprive a court of jurisdiction. *See, Arlan's Dept. Store v. Conaty*, 162 W. Va. 893, 898, 253 S.E.2d. 522, 522 (W. Va. 1979). In *Bias v. Workers' Compensation Commissioner,* 181 W. Va. 188, 381 S.E.2d. 743 (W. Va. 1989) the Supreme Court of Appeals considered an appeal of the dismissal of a claimant's appeal of a final order issued by the Workers' Compensation Appeal Board on the ground that the claimant's lawyer had failed to submit a brief accompanied by a proper certificate of service as required by Rule 4 of the Workers' Compensation Appeal Board. In reversing the dismissal of the claimant's appeal, this court distinguished technical violations of court rules, from situations where parties had failed to comply with time limits for filling appeals within the mandated time limits. While this court noted that the failure to comply with time limits for filing appeals acted to deprive an appellate court of jurisdiction to entertain an appeal, it ruled that a party should not be denied the adjudication of his or her claim for a mere technical violation of a rule because, to do so, would be contrary to the interests of justice. *Id. at 746.*

In *Talkington v. Barnhart,* 164 W. Va. 488, 264 S.E.2d. 450 (W. Va. 1980), this court considered a case very similar to the instant case. In the former case, the appellee had moved to dismiss the appellants' appeal on the ground that their counsel had failed to comply with W.Va. Rule of Civil Procedure, Rule 80 (c) by failing to notify the appellee that the trial transcript had been made a part of the record. Therefore,

appellee argued, the failure by the appellants' counsel to comply with Rule 90 (c) precluded the Supreme Court of Appeals from reviewing the trial testimony in the lower tribunal in order to determine the merits of the appeal. In refusing to grant the appellee's motion to dismiss the appellants' Petition for Appeal, this court cited as its authority for doing so, W.Va. Rule of Civil Procedure, Rule 1 and W.Va. Rule of Civil Procedure, Rule 61.

Rule 1 state as follows: These rules govern the procedure in all trial courts of record in all actions, suits, or other judicial proceedings of a civil nature whether cognizable as cases at law or in equity, with the qualifications and acceptations stated in Rule 81. They shall be construed to secure the just and inexpensive determination of every action.

Rule 61 states as follows: No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or vacating, modifying or otherwise disturbing a judgment order unless refusal to take such action appears to the court inconsistent with substantial justice. *The court in every stage of the proceeding must disregard any error or defect in proceeding which does not affect the substantial rights of the parties,* (emphasis supplied).

Of course, both *Arlan's Dept. Store*, *Supra* and *Bias, Supra*, concerned technical violations of court rules, as opposed to a statue such as West Virginia Code § 51-2A-11(b). Notwithstanding this fact, however, the end result should be the same. In *West Virginia Human Rights Commission v. Garretson*, 196, W. Va. 118, 468 S.E.2d. 733, this court considered the appeal of the dismissal of a Fair Housing Act claim, which had been timely and properly filed with the Human Rights Commission. Because the Human Rights Commission had failed to timely remove the case to the circuit court as required by West Virginia Code § 5-11A-13(o) (1), the action had been dismissed. In dismissing the suit, the Raleigh County Circuit Court specified that the Commission's failure to abide by the time restrictions set forth in West Virginia Code § 5-11A-13(o) (1)

had acted to deprive the circuit court of jurisdiction to entertain the lawsuit. On appeal, this court noted that the appeal would turn on the determination of whether West Virginia Code § 5-11A-13(o) (1) was mandatory or directory in nature. *Id.* at 740. In the end, this court concluded the statutory 30-day time period for filing a suit pursuant to West Virginia Code § 5-11A-13 (o) (1) was directory and not mandatory. In reaching this conclusion, this court noted that there is no authoritative checklist that can be consulted to determine conclusively if a statue is mandatory or directory. Notwithstanding this, this court noted that the absence of a section providing for consequences for an inaction or late action such as is the case with West Virginia Code § 51-2A-11(b), creates a presumption that the statue was intended to be directory as opposed to mandatory. *Id.* at 741.

This court went on to state that when a statute is silent as to whether it is mandatory or directory in nature, a court, in making that determination, must look at the statute's "...overarching design to glean the legislative intent of the statute." *Id.* at 742. The intent of the statute that is the subject of this appeal is obviously to extend due process protection to parties subject to those actions within the jurisdiction of the family courts by providing them with an opportunity to seek redress from erroneous decisions by family court judges. While it is true that under West Virginia Code § 51-2A-11 (b), a respondent to a petition for appeal has a right to file a reply to a petition for appeal, this right can be sufficiently protected by a less draconian measure than the arbitrary dismissal of a petition for appeal in the face of a petitioner's failure to serve a copy of his or her petition for appeal on one or more of the respondents. As this court noted in *Talkington, Supra,* there is a much less drastic measure for safeguarding the due

process rights of appellees than the outright dismissal of an appeal. In *Talkington*, the court held that before an appeal would be dismissed for failure by an appellant to comply with a rule, it would be incumbent on the appellee to show that he or she had sustained actual prejudice as a result of the appellant's noncompliance with the applicable rule. *Id.* at 493. In so holding, this court noted that West Virginia Code § 58-5-25, permits an appellee to establish that he or she has sustained such prejudice by means of filing a motion to dismiss the appeal.

Similarly, a respondent to a petition for appeal under West Virginia Code § 51-2A-11(b) has a right under West Virginia Code § 51-2A-13, to move for the dismissal of the petition for appeal. By construing that provision in West Virginia Code § 51-2A-11(b) providing for the service by a petitioner of copies of his or her petition for appeal upon each respondent to the appeal to be directory in nature, and thereby requiring a respondent to establish that he or she has sustained prejudice as a result of the noncompliance, this court would further the due process intent of West Virginia Code § 51-2A-11. This would ensure the substantial rights of appellants, (whom, as this court may take judicial notice of, very frequently, due to financial constraints, are unrepresented by counsel), are not unnecessarily compromised by technical procedural violations that do not result in prejudice to the rights of any party.

For the foregoing reasons, this Honorable Court should reinstate Appellant's Petition for Appeal from Family Court Final Order.

Very respectfully submitted,

Patrick F. Roche
Attorney for Appellant, John S. Guido

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. mail to Kendra M. Gray, Post Office Box 116, Wardensville, West Virginia 26851; and to Joseph M. Sellaro, Esquire, Bureau of Child Support Enforcement, 107-109 Adams Street, Post Office Box 2590, Fairmont, West Virginia 26555-2590 on the 23rd day of October, 2007.

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